

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0142; 03-0143; 04-0046
Gross Retail & Use Tax
Income Tax
For Years 1999, 2000, 2001

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail Tax—Automobile Sales

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1

Taxpayers protest the assessment of the state's gross retail tax on automobiles they allege their dealership did not sell.

II. Gross Income Tax—Automobile Sales

Authority: IC § 6-2.1-1-2; IC § 6-2.1-2-2; 45 IAC 1.1-2-1

Taxpayers protest the assessment of the state's gross income tax on automobiles they allege their dealership did not sell.

III. Penalty—Request for Waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayers protest the imposition of the 10% negligence penalty and request a waiver.

STATEMENT OF FACTS

Taxpayers, husband and wife, own a registered Indiana motor vehicle dealership. When taxpayers sold a car, the selling price upon which sales tax was charged was the sale price after deducting a trade-in. In the normal course of doing business, taxpayers completed the required ST-108's showing that the tax had been collected. The audit compared taxpayers' sales records

to sales reported to the Department and determined that taxpayers had underreported sales each year during the audit period. The income audit, based on the same set of facts and records, also determined that taxpayers had underreported their gross income for the audit period. At the hearing, taxpayers withdrew the hobby racing/use tax issue, docket number 04-20030142. Additional facts will be supplied as required.

I. Gross Retail Tax—Automobile Sales

DISCUSSION

Taxpayers protest the assessment of the state's gross retail tax on automobile sales taxpayers allege did not occur. Taxpayers kept envelopes/files folders for all vehicles sold, stating that if there were no envelopes/file folders for a particular month and year, then no automobiles were sold. Since there were no envelopes/file folders for 1999 and 2000, taxpayers allege they did not sell any automobiles in those years. However, because taxpayers failed to maintain complete records, the auditor examined the Dealer's Short Report for taxpayers' dealership, obtained from the Bureau of Motor Vehicles. The Dealer Short Report represents information gathered from ST 108's that all dealerships must send to the Bureau to show that tax has been paid on car sales. It was the information on the Dealer's Short Report that the auditor used to determine taxpayers' additional tax liabilities. The auditor did not examine any ST 108's. Taxpayers, at the time of the audit, had no evidence that the picked up sales were fraudulent. Taxpayers stated some of the vehicles were not sold by their dealership. At the hearing, taxpayers provided four microfiche copies of ST-108's for four vehicles taxpayers claim they did not sell. Taxpayers pointed out that on the ST-108's, addresses are incorrect or not there at all, there are incomplete dealership numbers, incorrect zip codes, and there are no FID numbers. The taxpayers also claim the signatures are forged.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1.

At this time, taxpayers state that they cannot obtain all the ST-108's the audit relied on to assess the additional sales tax because the cost of obtaining copies of the microfiche from the Bureau of Motor Vehicles is prohibitive. The ST-108's are not in the file. Taxpayers have the burden of showing that an audit assessment is incorrect. Without more evidence that the audit assessment is incorrect, taxpayers have not sustained their burden of proof.

FINDING

Taxpayers' protest concerning the assessment of the state's gross retail tax on vehicles taxpayers claim they did not sell is denied.

II. Gross Income Tax—Automobile Sales

DISCUSSION

The same facts from the gross retail tax issue apply to the gross income tax issue. The same arguments and evidentiary issues also apply. The applicable statutes and regulations regarding the state's gross income tax, IC § 6-2.1-1-2, IC § 6-2.1-2-2, and 45 IAC 1.1-2-1, impose the gross income tax on "all the gross receipts a taxpayer receives" from business activities within the state of Indiana. *See*, IC § 6-2.1-2-2(a)(1). Taxpayers would owe gross income tax on receipts from automobile sales, provided that such gross income can be plausibly identified. This is the same issue and analysis as appeared under the discussion of the state's gross retail tax, *supra*. Without more evidence to show that the audit assessment is incorrect, taxpayers have not sustained their burden of proof.

FINDING

Taxpayers' protest concerning the assessment of the state's gross income tax on vehicles taxpayers claim they did not sell is denied.

III. Penalty—Request for waiver

DISCUSSION

Taxpayers protest the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due. Taxpayers essentially cite the fraudulent ST-108's as the basis for not paying the taxes owed.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayers have not set forth a basis whereby the Department could conclude taxpayers exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer in maintaining

proper records. Therefore, given the totality of all the circumstances, waiver of the penalty on the entire assessment is inappropriate in this particular instance.

FINDING

Taxpayers' protest concerning the proposed assessment of the 10% negligence penalty is denied.

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